United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-2172 B

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. EFRAIN SANTIAGO,

Petitioner-Appellee,

-against-

LEON VINCENT, Superintendent of Green Haven Correctional Facility,

Respondent-Appellant.

Docket No. 76-2172

REPLY BRIEF FOR RESPONDENT-APPELLANT

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UNITED STATES OF AMERICA ex rel. :
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Green Haven Correctional Facility, :
:
Respondent-Appellant. :

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REPLY BRIEF FOR RESPONDENT-APPELLANT

ARGUMENT

MILDRED CRESPO WAS NOT A CRUCIAL PROSECUTION WITNESS. SHE HAD NO REASON TO, AND DID NOT, LIE OR FALSIFY HER TESTIMONY AT TRIAL. UNDER THESE CIRCUMSTANCES, THE DISTRICT COURT IMPROPERLY ISSUED THE WRIT OF HABEAS CORPUS.

On this habeas corpus application, appellee has the burden of proof.

> "It is hornbook law that a collateral attack on a criminal conviction must overcome the threshhold hurdle that the challenged judgment carries with it a

> presumption of regularity and that the burden of proof is on the party seeking relief." William v. U.S., 481 F. 2d 339, 346 (2d Cir. 1973), cert. den., 414 U.S. 1010 (1973).

At bar, appellee had to establish by a preponderance of the evidence that he was denied his constitutional rights to confront the witnesses against him because "relevant and important facts bearing on crucial testimony" were kept from the jury. Gordon v. United States, 344 U.S. 414, 423 (1953). This he did not do.*

Far from proving any fact that was kept from the jury, the District Court opinion recognizes that appellee did not meet his burden since the Court merely concludes that there is a "sufficient likelihood that Mildred Crespo believed in the early morning of December 17th that her brother was arrested or was a suspect in the murder". (8a)

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* Appellee states the "burden of proof should properly have been placed on the State", citing U.S. ex rel. Cannon v. Smith, 527 F. 2d 702 (2d Cir., 1975). This is incorrect. The Court in Cannon did not shift the burden of proof to the respondent; it simply held that petitioner had met his burden of persuasion.

Trying to salvage this inconclusive finding, appellee argues in his brief that the finding of a "sufficient likelihood" that Mildred Crespo believed her brother was arrested or a suspect is adequate since a possibility of bias is sufficient to permit extensive cross-examination on the subject (Appellee's brief, p. 19). However, although a possibility of bias might permit cross-examination in a case where there are some undisputed facts from which bias might be inferred, at bar, the District Court has specifically concluded contrariwise, i.e., that it is unclear that Mildred Crespo even believed her brother was a suspect, let alone that her testimony identifying appellee as the murderer was untruthful. Compare, Davis v. Alaska, 415 U.S. 308 (1974)(undisputed that witness Green was a probationer); United States v. Garrett, 542 F. 2d 23 (6th Cir., 1976) (undisputed that witness Lehman had been suspended from duty as police officer for refusal to take a urine test); Johnson v. Brewer, 521 F. 2d 556 (8th Cir., 1975) (undisputed informant lied on a prior occasion); United States v. Masino, 275 F. 2d 129 (2d Cir., 1960) (undisputed witnesses Brown and Beville had pending criminal charges against them dismissed).

Moreover, contrary to appellee's assertions, the trial and hearing records make clear that Mildred Crespo never believed her brother was a suspect. At trial she

testified she never heard her brother was arrested for the murder (T. 730) and she repeated that testimony at the hearing.

Of course, this whole inquiry is irrelevant to the fairness of appellee's conviction since a theory of bias on the part of the prosecution witnesses was never a part of the defense strategy. This was made clear at the hearing before Judge Gagliardi by appellee's trial attorney, Howard Getz, Esq. As he explained to the Court, he simply asked Mildred to state whether she had learned her brother had been taken to the stationhouse because Mildred's brother, PeeWee, had "described the person that they [the police] had described to him as the person who committed the homicide, and in my opinion, the both of them look very much alike, PeeWee Crespo and the defendant, at the time..." (H. 96).

In addition to Mr. Getz' own statement at the hearing, his conduct at the trial supports no view other than that he was trying this case on a mistaken identity theory. Mildred Crespo was one of the last witnesses to testify for the People. The questioning throughout the trial was designed to shake the various prosecution witnesses'

identification of the appellee. Viewed in this context, Mr. Getz' inquiry at trial as to whether she learned that PeeWee Crespo was at the stationhouse was clearly irrelevant and the Court properly sustained an objection to the line of questioning since it did not relate to her ability to identify the appellee and called for an answer based on hearsay.

Appellee was the only suspect in the homicide which Mr. Getz knew. Accordingly, he did not make such a theory a part of the defense. Not surprisingly, when his questions to Mildred Crespo were objected to, he made no claim that they were designed to show bias or motive to lie on her part (Compare, U.S. v. Masimo, supra.) It is significant that the confrontation claim now under consideration was raised for the first time on appeal when appellee was being represented by a different attorney from the one who had represented him at trial who, so far as the record indicates, had not interviewed any of the trial witnesses but was, with the benefit of hindsight, arguing for reversal of the conviction on a new theory of how the trial should have proceeded, hardly a ground for relief here.

It is, of course, a truism that there is no constitutional requirement of a perfect trial. But here there can be no question that appellee had a fair trial at which he was represented by competent counsel who had no belief that any of the prosecution witnesses were biased because there was another suspect as indeed, there was not. As was stated by Judge Lumbard in U.S. v. Ong, 541 F. 2d 331, 342 (2d Cir., 1976):

> "We do not believe that the Court in Davis meant to sanction speculative expeditions into areas only tangentially related to the facts in the hope that some basis for implying an ulterior motive might be found."

There clearly was no constitutional basis for the granting of the writ.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED.

Dated: New York, New York
November 21, 1977

Respectfully submitted,

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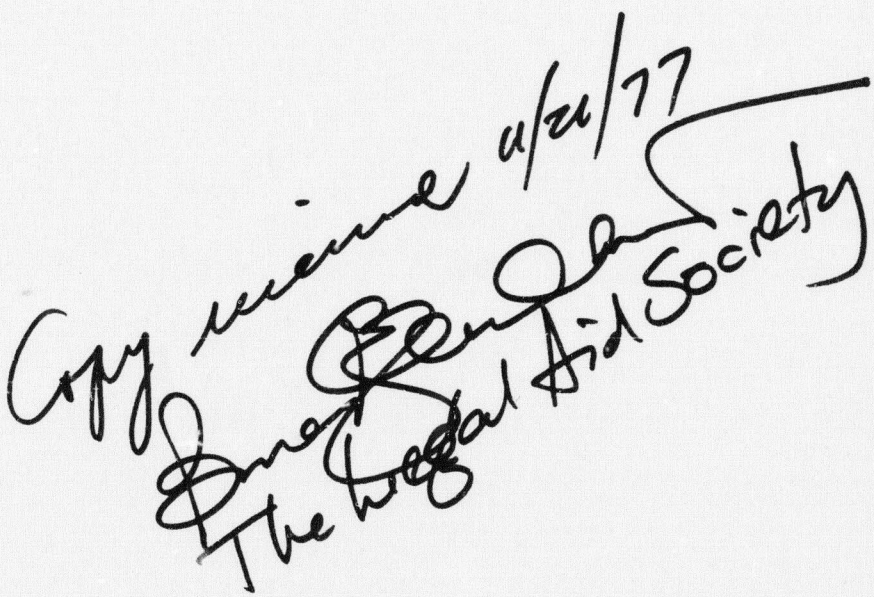
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